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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER HEMPHILL,

Defendant and Appellant.

B291569

(Los Angeles County  
Super. Ct. No. LA087559)

APPEAL from judgment of the Superior Court of Los Angeles County, Thomas Robinson, Judge. Affirmed as modified.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

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Christopher Hemphill appeals from a judgment of conviction for pandering. We modify the judgment to strike two sentencing enhancements, and affirm as modified.

### **FACTS**

On January 7, 2018, Officer Charis Simmons was assigned to pose undercover as a prostitute in the area of Sepulveda Boulevard and Gault Street. She had worked undercover in that area many times, having been on the human trafficking task force for two years. She arrived at approximately 11:00 p.m.

Soon thereafter, Simmons encountered Hemphill; they nodded to one another as he walked towards her. Simmons asked him if he had cash, which was a typical question asked by a prostitute to determine whether someone was a potential customer or “John.” Hemphill responded he had a room and offered it to her when Simmons said she needed money to rent a room. Simmons asked what she had to do for the room, joking, “I don’t do anal.” Hemphill responded, “Don’t be mean.”

Simmons explained she came to Los Angeles with a girlfriend whom she met while dancing at a strip club in Ohio. Simmons said the girlfriend no longer wanted Simmons to stay with her and Simmons was waiting for her to come back with her clothes and identification. Hemphill said he did not believe the girlfriend would return and pressed Simmons to come with him to his room. Simmons promised to go to Hemphill’s room, but wanted to wait a little longer for her girlfriend. Simmons testified it was unusual for a John to want to go into a room with a prostitute, due to the risk of robbery by the prostitute’s pimp.

During their conversation, Simmons complained her previous “date”<sup>1</sup> failed to pay her for oral sex. She said she did not know “how this works” because things were different in Ohio. Hemphill discouraged Simmons from discussing prostitution in public. Hemphill expressed discomfort discussing Simmons’s “date” and continued to urge her to go to his room. He said, “you’re going into the details so much I think you’re . . . the police or something.” At one point, Simmons asked, “What if I get a date out here? Can I bring him back to the room or no?” Hemphill responded, “okay,” but questioned why she had to spell everything out and asked if she was recording their conversation. He later called her “officer.”

Hemphill assured Simmons, “I guarantee that I have a solution” and “I got you,” while urging her to go to his room. Simmons again asked what she had to do to get the room because “nothing’s free.” He repeated, “don’t be mean.” He told her that her company was “nice.” He clarified, “Look, I just said hey you’re welcome to come by and it seems like you are in a tough spot.”

Simmons explained she wanted a “business partner” who would protect her, but she needed to know what her share of the profits would be. She complained the club in Ohio where she worked had taken 80 percent of the money she earned. Hemphill did not answer, but assured her several times he did not want anything from her “right now.”

Simmons testified that during their approximately 20-minute conversation, Hemphill continuously motioned for her to go to his motel room and sometimes grabbed her hand to pull her

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<sup>1</sup> Simmons testified the term “date” referred to an assignation with a John.

towards the motel. He became frustrated when she refused to go with him and began to speak aggressively toward her. She once walked away from him; he followed her and tried to get her to go back to the motel with him. Several times he offered to get her something to eat, another identification card, and some clothes if she agreed to go inside to talk.

In Simmons's experience, Johns typically do not engage in extended conversation with a prostitute. Based on their conversation and his actions, Simmons believed Hemphill was a pimp, because he offered a solution to her problems, including offering her a room, clothes, and a new identification card. Her opinion was also based on the fact that he told her what to say and not say in public. She said a regular John would never give the prostitute "anything except payment for the sex."

Simmons further testified a pimp will typically want a prostitute to go immediately to a room to engage in "initiation rape or sex" to ensure they can trust one another. Afterwards, they discuss pricing and exchange phone numbers.

Hemphill was arrested, charged and convicted of one count of pandering. (Pen. Code, § 266i, subd. (a)(2).) He admitted he suffered two prior strikes pursuant to the Three Strikes law, but the trial court granted his motion to strike them under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. Hemphill also admitted to two prior prison terms pursuant to Penal Code section 667.5, subdivision (b). The trial court imposed the low term of three years in state prison for the pandering count, and imposed and stayed two one-year enhancements based on his prior prison terms. Hemphill timely appealed.

## DISCUSSION

### I. There Was Insufficient Evidence to Support an Entrapment Instruction

Hemphill contends the trial court was obligated to sua sponte instruct the jury on entrapment as a defense to pandering. We disagree because there was not substantial evidence of entrapment to support such an instruction.

Any person who, “[b]y promises, threats, violence, or by any device or scheme, causes, induces, persuades, or encourages another person to become a prostitute” is guilty of pandering. (Pen. Code, § 266i, subd. (a)(2).) An entrapment defense is available when a jury can conclude that the conduct of law enforcement agents involved in a case is “likely to induce a normally law-abiding person to commit the crime.” (*People v. Barraza* (1979) 23 Cal.3d 675, 690 (*Barraza*).) “Official conduct that does no more than offer th[e] opportunity” to commit an offense does not constitute entrapment. (*Ibid.*) Thus, the use of ruses, stings, and decoys by law enforcement does not constitute entrapment so long as no pressure or overbearing conduct is employed. (*Proviso Corp. v. Alcoholic Beverage Control Appeals Bd.* (1994) 7 Cal.4th 561, 568–599 (*Proviso Corp.*).)

Entrapment results when “the police or their agents . . . pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime.” (*Barraza, supra*, 23 Cal.3d at p. 690.) Entrapment may be shown if the actions of law enforcement make the offense “unusually attractive to a normally law-abiding person” by, for example, creating a motive for the offense “other than ordinary criminal intent,” such as “friendship or sympathy, instead of a desire for

personal gain or other typical criminal purpose,” or by “a guarantee that the act is not illegal or the offense will go undetected, an offer of exorbitant consideration, or any similar enticement.” (*Ibid.*)

The trial court has a duty to instruct on entrapment when a defendant relies on that defense or there is substantial evidence supporting that defense that is not inconsistent with the defendant’s theory of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 157; *Barraza, supra*, at p. 691.) Substantial evidence is evidence of a defense that is sufficient for a reasonable trier of fact to find a reasonable doubt as to the defendant’s guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982–983.)

An entrapment instruction was not warranted in this case. It is undisputed that Hemphill did not rely on an entrapment defense at trial. In addition, there was no substantial evidence to support it. Here, Officer Simmons posed as a decoy to enforce the pandering law. Contrary to Hemphill’s contention that Simmons “kept pushing” him into making incriminating statements, the record discloses she did nothing more than offer Hemphill the opportunity to commit the offense. That is a permissible stratagem for law enforcement to use. (*Provigo Corp., supra*, 7 Cal.4th at p. 569; *Barraza, supra*, 23 Cal.3d at p. 690.)

Hemphill contends that using Simmons as a decoy became entrapment when she badgered, cajoled, and importuned him into uttering “buzzwords” from her checklist for pandering. The record shows otherwise. Simmons told Hemphill a story that was typical of the prostitutes in the area: she had just moved here from another state, her friend had taken her identification card and clothes, and she needed a “business partner” to help her.

These statements did not make the crime of pandering unusually attractive to a normally law-abiding person; they merely offered Hemphill the opportunity to be her pimp.

There was no evidence, for example, that Simmons enticed Hemphill with exorbitant consideration. She did not offer him a large share of the profits. In fact, she expressly stated she was not interested in an arrangement where she received less than an equal share of the profits; she complained the club in Ohio took 80 percent of the money she earned. She also did not attempt to entice Hemphill with any sexual act; she never offered to have sex with him and told him she did not perform anal sex.

Moreover, Simmons did not guarantee they would not be caught for an unlawful act. Indeed, it was abundantly clear that Hemphill understood their conduct was illegal because he accused Simmons of being a police officer several times. He also urged her several times not to discuss her prostitution activities or any partnership between them in public.

We are also not persuaded by Hemphill's argument that Simmons's story played on his sympathies. Entrapment involves a feeling of friendship or sympathy that motivates the defendant to commit the particular crime, not simply sympathy to a decoy as a general matter. Here, Hemphill does not contend he was motivated to commit the crime of pandering because he felt friendship or sympathy towards Simmons instead of a desire for personal gain or other typical criminal purpose. Given this record, there was insufficient evidence to warrant a sua sponte instruction on entrapment.

## **II. The Enhancements on the Prior Prison Term Allegations Should Be Stricken**

Hemphill admitted, and the trial court found true, the allegation that Hemphill suffered two prior prison terms pursuant to Penal Code section 667.5, subdivision (b). At sentencing, the trial court imposed and stayed the two one-year enhancements. The People concede, and we agree the trial court's sentence was unauthorized. (*People v. Vizcarra* (2015) 236 Cal.App.4th 422, 432.)

Penal Code section 667.5, subdivision (b) provides for a one-year sentence enhancement "for each 'prior separate prison term served for any felony,' with an exception not applicable here involving a prior five-year commitment 'washout' period of freedom from custody and further felony offenses." (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) Once the prior prison term is found true, the trial court must impose the sentence enhancement or strike it. It may not impose and stay the enhancement. (*Ibid.*)

The People urge us to remand the matter for resentencing. We decline to do so as it would be an idle act. The record clearly shows the trial court did not intend to impose any additional prison time for the enhancements. Indeed, its sentencing of Hemphill was lenient. The trial court imposed the low term of three years for the pandering charge. It also granted Hemphill's *Romero* motion, finding the two prior strikes were old and did not involve violence or injury to any person. The two prior strikes underlying Hemphill's *Romero* motion are the same convictions underlying the enhancement allegations under Penal Code section 667.5, subdivision (b). The court specifically found the current case involved a less serious felony, and resulted in no



injuries or financial loss. The trial court also noted Hemphill comported himself appropriately in court.

From this record, the trial court's intention not to impose the enhancements is clear. We thus modify the judgment by striking the enhancements. (See *People v. Bradley* (1998) 64 Cal.App.4th 386, 391 [an unauthorized sentence may be corrected for the first time on appeal].)

#### **DISPOSITION**

The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation a corrected abstract of judgment that indicates the two one-year prior prison term enhancements under Penal Code section 667.5, subdivision (b) are stricken. The judgment is affirmed as modified.

BIGELOW, P. J.

WE CONCUR:

STRATTON, J.

WILEY, J.